

Intellectual Property Laws and Governance

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INTRODUCTION

[9.10] Since the Open Door policy of 1978, intellectual property laws in China have been promulgated similar to those in existence in the United States and many European countries. This has transpired initially as a means of encouraging foreign investment and technology transfer. Then, in the lead up to China's membership of the World Trade Organisation (WTO) in 2001, the Chinese government was required to develop intellectual property laws that complied with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) 1994.¹ The TRIPS Agreement prescribes agreed elements of an effective mechanism for administration and enforcement of intellectual property rights. Article 61 requires each WTO member to create a transparent mechanism whereby the member is required to provide details of their national intellectual property laws and systems and answer questions about their intellectual property systems. The objectives² and principles³ of the TRIPS Agreement allow for mechanisms that ensure that national intellectual property systems support widely acceptable public policy objectives such as stamping out unfair competition, protecting public health and nutrition, and facilitating transfer of technology. But what is unique about the TRIPS Agreement is that it has created a predictable rules-based system for the settlement of disputes about trade-related intellectual property issues between WTO members – a mechanism that China has been involved in on several occasions.

China's compliance with the enforcement provisions in the TRIPS Agreement has been of concern to WTO members ever since membership was granted in 2001. Article 41 of the TRIPS Agreement establishes the general obligations on member nations for intellectual property enforcement:

- Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of

¹ The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) adopted in Marrakesh on 15 April 1994 33 ILM 81 (1994).

² TRIPS Agreement, Art 7.

³ TRIPS Agreement, Art 8.

infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

- Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
- Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard
- Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

Though China has not managed to comply with all these requirements, this chapter illustrates that due to ongoing pressure from the United States, and other WTO member nations, it is attempting to remedy its poor intellectual property enforcement reputation.

Prior to the TRIPS Agreement, China undertook a programme that acceded to the main international intellectual property conventions and agreements which began with its membership of the World Intellectual Property Organization in 1980 and the *Paris Convention* in 1984. In 1982 with the adoption of the Constitution of the People's Republic of China at the Fifth Session of the Fifth National People's Congress, the first substantive laws covering intellectual property rights were promulgated.

Though China has passed a raft of intellectual property laws and regulations which have been subject to numerous amendments, it is the enforcement of those laws that remain a thorn in the side of the Chinese government attracting criticism from many nations and in particular the United States. This chapter gives an overview of China's Intellectual Property Laws and provides a critique on the current status of its implementation of these laws.

INTELLECTUAL PROPERTY LAWS OF THE PRC

[9.20] Trade marks, patents and copyright are addressed in Articles 94-97 of the *General Principles of the Civil Code* which provide that citizens and legal people have the right to enjoy protection of copyright, patents and trademarks. For example, Art 97 provides that those who make discoveries have the rights to apply for and receive certificates for their discovery as well as bonuses. The specific laws relating to each area of intellectual property are addressed below.

Trade marks

[9.30] The *Trade Mark Law of the People's Republic of China* was adopted in 1982 at the 24th Session of the Standing Committee of the Fifth National People's Congress. It was revised for the first time according to the Decision of the Amendment of the Trademark Law of the People's Republic of China adopted at the 30th Session of the Standing Committee of the Seventh National People's Congress on 22 February 1993 and revised for the second time according to the Decision on the Amendment of the Trademark Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001, in the lead up to membership of the WTO, and followed by implementing provisions.

Its purpose is stated in Article 1 as follows:

This Law is enacted for the purposes of improving the administration of trademarks, protecting the exclusive right to use trademarks, and of encouraging producers and operators to guarantee the quality of their goods and services and maintaining the reputation of their trademarks, with a view to protecting the interests of consumers, producers and operators and to promoting the development of the socialist market economy.

Article 10 contains a comprehensive list of what is not a trademark, notably: 'those detrimental to socialist morals or customs, or having other unhealthy influences'.⁴

⁴ Article 10 (8).

Patents

[9.40] The *Patent Law of the People's Republic of China* (the *Patent Law*) was adopted in 1984, followed by implementing provisions. Article 1 provides for the provision of the rights of patentees and encourages invention and creations promoting scientific and technological progress and economic and social development. The *Patent Law* formed part of the process necessary to achieve the objectives of the Open Door Policy era, namely the Four Modernisations, referring to the modernisation of China's industry, agriculture, national defence and science and technology. Deng Xiaoping discussed the Four Modernisations in many of his speeches since he came into power in August of 1977.⁵ He believed that China had to encourage the use of the advanced technologies and achievements from around the world in order to expand the economy and achieve the Four Modernisations.⁶

This philosophy continues today with the Chinese government recognizing the need to raise its scientific and technological capabilities in order to achieve the Four Modernisations which has been reaffirmed in China's 2011 12th Five Year Plan.⁷

Article 1 reflects the objectives of Art 7 of the TRIPS Agreement and states:

This Law is enacted to protect patent rights for inventions-creations, to encourage inventions-creations, to foster the spreading and application of inventions-creations, and to promote the development of science and technology, for meeting the needs of the construction of socialist modernization.⁸

⁵ See the series of English excerpts from Deng's speeches in *Selected Works of Deng Xiaoping*, Volume II (1975-1982), <http://english.cpc.people.com.cn/mediafile/200607/05/F2006070515261400629.swf> (22 November 2009).

⁶ See the series of English excerpts from Deng's speeches in *Selected Works of Deng Xiaoping*, Volume II (1975-1982), <http://english.cpc.people.com.cn/mediafile/200607/05/F2006070515261400629.swf> (22 November 2009).

⁷ Wen Jiabao, Premier of the State Council, *Report on the Work of the Government* (Delivered at the Fourth Session of the Eleventh National People's Congress, 5 March 2011).

⁸ The 2008 amendments also amended Art 1 but maintained accord with Art 7 of the TRIPS Agreement: 'This Law is hereby formulated in order to protect the legitimate rights and interests of patentees, encourage inventions and creations, promote the application of inventions and creations, improve the innovation capability, and promote the scientific and technological progress and economic and social development.'

The most recent amendment to the *Patent Law* was promulgated on 27 December 2008 and came into effect on 1 October 2009 which allows administrative authorities to inquire, conduct site inspections, copy documents and seize goods that are suspected of infringing the *Patent Law*.⁹ The amendment has raised the fine from 3 to 4 times where there is proven evidence of illegal proceeds being obtained through an infringement of the patent. The overall fine for patent infringement has been raised from RMB 50,000 to RMB 200,000.¹⁰ As for compensation to the patent owner, where loss to the owner is difficult to ascertain, the People's Court has the discretion 'in light of the type of the patent right, nature and circumstance of the infringement and other relevant factors, ascertain a compensation of not less than RMB 10,000 but not more than RMB one million'.¹¹

A new Art 5 has been added to the *Patent Law* which provides that 'no patent shall be granted if an invention is based on genetic resources obtained or used in violation of any laws or administrative regulations'.

Genetic material is classified as any material obtained from the human body, animals, plants or microorganisms that contains a genetic functional unit and has actual or potential value.¹² This change came about because laws relating to genetic resources were found in a number of other laws such as Animal Husbandry Law, Seeds Law, and Environmental Protection Law and as result there was no comprehensive law in this area. Article 26 requires an applicant to explain and disclose the source of the new invention involving a genetic resource and provide reasons if they cannot do so. The new Article is the result of Doha negotiations held in 2008 where the 110 members of the WTO inclusive of China argued for a disclosure obligation in the TRIPS Agreement.¹³

While computer programmes are not specifically mentioned in the *Patent Law*, Art 25 states that 'rules and methods for mental activities' cannot be patented but software can obtain copyright protection under the *Regulations on Computers Software Protection*. The State Intellectual Property Office (SIPO) website states that '[a]n invention containing a computer

⁹ *Patent Law of the People's Republic of China 2008*, Art 64

¹⁰ *Patent Law of the People's Republic of China 2008*, Art 63.

¹¹ *Patent Law of the People's Republic of China 2008*, Art 65.

¹² *Implementing Regulations of the Patent Law of the People's Republic of China*, rule 26.

¹³ Shruti U Bhat, 'New Chinese Patent Law: What Does it Mean for Life Sciences', 6 February 2011, <http://pharmaceutical-patents.blogspot.com/2011/02/new-chinese-patent-law-what-does-it.html> (11 August 2011).

program may be patentable if the combination of software and hardware as a whole can ... improve prior art, bring about technical results and constitute a complete technical solution'.¹⁴

Copyright

[9.50] The *Copyright Law of the People's Republic of China (Copyright Law)* adopted in 1990 is a general and flexible law. It operates in conjunction with the *Regulations for the Implementation of the Copyright Law of the People's Republic of China*.¹⁵ The *Copyright Law* was adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, and revised in accordance with the Decision on the Amendment of the Copyright Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001 (once again in order to meet WTO and TRIPS requirements). Article 1 states its purpose as:

This Law is enacted, in accordance with the Constitution, for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and the copyright-related rights and interests, of encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and of promoting the development and prosperity of the socialist culture and science.

As a result of the January 2009 decision of the WTO's Dispute Resolution Panel considering various claimed failings of the Chinese Intellectual Property regime,¹⁶ the *Copyright Law* was further revised in 2010 to ensure copyright protection extended to rights holders whether their works were permitted for distribution in China or not.¹⁷

¹⁴ 'Computer software', SIPO, 4 August 2009, http://english.sipo.gov.cn/FAQ/200904/t20090408_449722.html (11 August 2011).

¹⁵ And the *Regulations on Computer Software Protection* (2002).

¹⁶ WTO Dispute Resolution Action: WT/DS362.

¹⁷ *Copyright Law of the People's Republic of China (2010)*, Art 4.

ADMINISTRATION OF INTELLECTUAL PROPERTY LAWS AND REGULATIONS

[9.60] Each area of intellectual property is administered by a different government authority which is somewhat confusing. For example the State Intellectual Property Office (SIPO) covers patents, utility models and designs. It also includes the Patent Re-Examination Board and administers the registration system for patents, utility models and designs as well as a higher level policy responsibility and enforcement role.¹⁸ SIPO is responsible for ‘planning and formulating drafts of IP and patent laws and regulations’ and assists local authorities in dealing with patent infringement disputes.¹⁹ SIPO also educates the general public and trains the profession, and is responsible for foreign communications and policy making.²⁰

Trade marks are covered by the China Trade Mark Office (CTMO), Trademark Review and Adjudication Board (TRAB) and Trademark Appeal Board within the State Administration of Industry and Commerce (SAIC). Copyright administration is undertaken by the National Copyright Administration for China (NCAC). In addition, the *Law Against Unfair Competition of the PRC* provides protection in relation to trade names and unfair competition (known as passing off in common law jurisdictions), control of anti-competitive practices in contractual licences and the protection of undisclosed information.

SAIC operates directly under the State Council and is responsible for the administration of trade mark registration and protection and policy development.²¹ The CTMO is responsible for the registration and administration of trade marks in China and reviews of CTMO decisions can be brought before TRAB.²² CTMO is responsible for the filing, registration and protection of special marks and official marks, the recognition and protection of well-known marks, the handling of various disputes concerning trademarks, the protection of the exclusive rights pertaining to registered trademarks as well as the investigation of trade mark infringements.²³ It implements the trade mark strategy, contributes to government policy-making through the conduct of studies and analyses on trade mark registration and publishes

¹⁸ These are described at the SIPO website <http://english.sipo.gov.cn/> (11 August 2011).

¹⁹ At <http://english.sipo.gov.cn> (11 August 2011).

²⁰ At <http://english.sipo.gov.cn> (11 August 2011).

²¹ Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 194.

²² Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 194.

²³ Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 194.

this data making it available to the public.²⁴ Meanwhile, the Trademark Appeal Board handles trade mark disputes. NCAC is also an administrative department under the State Council. The local administrations of the NCAC have had the power to initiate actions against infringers since 2002.²⁵ In the case of trademarks, the SAIC, or more likely its local authority (AIC), has the power to investigate and deal with trade mark infringements.²⁶

In relation to international trade, the China General Administration of Customs is responsible for enforcing Border Protection Division for IP Protection. Criminal infringement and piracy are also handled by numerous public security authorities through the Ministry of Public Security and in accordance with the Criminal Law of the PRC (Provisions of Intellectual Property Crime).

China has a well-developed system of courts that specialise in dealing with IP infringement and the implementation of these laws is improving rapidly. The highest court is the Supreme People's Court. In March 2009 this Court issued guidelines that provide for greater enforcement of China's national IP framework. The court has established special tribunals to deal with IP rights disputes and a unified appellate court.²⁷ In April 2010 the Court issued the 'Opinions of the Supreme People's Court on Several Issues Concerning Hearing the Administrative Cases Involving Grant and Ascertaining of Trademarks'. This opinion provides for a review of the Trademark Appeal Board where there has been refusal of trademark registration, review on objection to trademark, trademark disputes, review on cancellation of trademark or other specific administrative acts.²⁸

Other such courts are found in each province, autonomous region and municipality under the authority of the central government. First instance hearings take place either in the Intermediate People's Court or the High People's Court where a foreign owner is involved. Intellectual Property Tribunals or Trial Divisions were established in the courts from 1993

²⁴ Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 194.

²⁵ Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 195.

²⁶ Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 195.

²⁷ 'Supreme People's court promises tougher IP rights enforcement', 5 May 2009, <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=dbc6cfec-933e-43c4-b54f-8d916c9118d4> (8 August 2011).

²⁸ 'Opinions of the Supreme People's Court on Several Issues Concerning Hearing the Administrative Cases Involving Grants and Ascertaining of Trademarks' 4 April 2010.

and renamed Third Civil Tribunals in 2000 for infringement and contract disputes.²⁹ As China is a civil system judge-made law is not recognized and judicial opinions issued by the Supreme People's Court are official interpretations only and not precedents.

COMPLIANCE WITH INTELLECTUAL PROPERTY LAWS

[9.70] There have been and continue to be many ongoing problems associated with the enforcement of Intellectual Property Laws in China. The United States in particular has constantly criticized China's poor enforcement of intellectual property laws. As a result a Memorandum of Understanding was entered into with the US in 1992 along with China joining the *Berne Convention* and the *Universal Copyright Convention* in 1992 in order to deal with the problem. The result was the introduction of regulations that sought to improve protection of software, and provide for criminal sanctions where copyright infringement was proven.³⁰ China also introduced the *Law against Unfair Competition of the People's Republic of China* in 1993, and established specialised courts that dealt with infringements of Intellectual Property. In January 2001 the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security issued a document entitled 'Opinions on Handling Several Issues in IP Criminal Cases' which has modified the proof requirements in copyright infringements in order to lead to more successful prosecutions.

The telling reference point for China's compliance regime is found in the US Special 301 Reports which are released each year, prepared pursuant to section 182 and under the Special 301 provisions of the United States Trade Act 1974 as amended. The United States Trade Representative (USTR) has the obligation to 'identify those countries that deny adequate and effective protection for IPR [Intellectual Property Rights] or deny fair and equitable market access for persons that rely on intellectual property protection'.³¹ China is still after many years subject to the Priority Watch List. The significance of the Special 301 mechanism is that it provides the United States with the power to coerce the implementation of stronger intellectual property protection by an offending state and allows them to threaten trade

²⁹ Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 196.

³⁰ Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 189.

³¹ See Annex 1, Statutory Background on Special 301 Report, 2009.

restrictions. It also permits them to consider invoking the WTO dispute settlement processes even where the country is recognised as TRIPS-compliant.³²

The 2011 Report continues to have China on the Priority Watch List and subject to ongoing Section 306 monitoring.³³ However, it recognizes that China has made a huge effort to improve the monitoring of intellectual property. Premier Wen Jiabao launched the ‘Program for Special Campaign on Combating IPR Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities’, referred to as the ‘Special Campaign’, in October 2010.³⁴ It was intended to end in March 2011 but was extended to the end of June 2011. The ‘Special Campaign’ is designed to catch those violating intellectual property laws focused on infringement over the internet such as the illegal downloads of music and movies and selling pirated CDs and DVDs for which China has been renounced in the past and has a very poor record.³⁵ It also targeted counterfeit mobile phones, auto parts, bulk commodity exports and pharmaceuticals.³⁶ Led by the Ministry of Commerce and 26 other agencies, the ‘Special Campaign’ has operated not only at the central level but at the provincial and local levels.³⁷ Nevertheless the Report recognizes that piracy on the internet continues and 99 per cent of all music downloads are considered to be illegal.³⁸ This is a major violation considering that there are 457 million internet users in China compared to America’s 223 million.³⁹ However, the campaign has seen several operations shut down and operators sent to prison for terms ranging from 3 – 5 years as well as fines between US\$30,000 and US\$228,000.⁴⁰

Guangdong province in particular has been cited with major counterfeiting activities in the area of clothes, footwear, mobile phones, pharmaceuticals, medical equipment, herbal remedies, wine and liquor, agricultural chemicals, electronic components, and computer equipment and software.⁴¹

³² USTR, Special 301 Report, Out of Cycle Review of China, 29 April 2005.

³³ USTR, 2011 Special 301 Report, p 19.

³⁴ USTR, 2011 Special 301 Report, p 19.

³⁵ USTR, 2011 Special 301 Report, p 19.

³⁶ USTR, 2011 Special 301 Report, p 19.

³⁷ USTR, 2011 Special 301 Report, p 20.

³⁸ USTR, 2011 Special 301 Report, p 20.

³⁹ USTR, 2011 Special 301 Report, p 19.

⁴⁰ USTR, 2011 Special 301 Report, p 19.

⁴¹ USTR, 2011 Special 301 Report, p 19.

China has focused on indigenous innovation (also known as ‘self-innovation’) whereby agencies at all levels have promoted the use of Chinese innovations ahead of foreign-owned innovations.⁴² The 2011 Special 301 Report noted that in 2009 the Ministry of Science and Technology, the Ministry of Finance, and the National Development and Reform Commission announced a National Indigenous Innovation Product Accreditation System to operate within certain criteria.⁴³ Under this programme an applicant’s products would need to possess Chinese intellectual property and proprietary brands, the applicant would need to be a Chinese enterprise institution or citizen who lawfully owns intellectual property, the use and handling of the secondary development of intellectual property would need to be independent of overseas organizations or individuals and an applicant would be required to own the trade mark for the eligible products and ensure that first registration was in China.⁴⁴ However, the United States was not satisfied with this proposal citing inconsistencies with WTO rules and required the Chinese government to invalidate many Chinese provincial and municipal indigenous innovation product accreditations and draft regulations that implement do not permit the Government Procurement Law to contain special conditions.⁴⁵ Recently, with effect from 1 July 2011, the Ministry of Finance revoked three measures relating to its indigenous innovation policy: the *Evaluation Measures on Indigenous Innovative Products for Government Procurement*; the *Administrative Measures on Budgeting for Government Procurement of Indigenous Innovative Products*; and the *Administrative Measures on Government Procurement Contracts for Indigenous Innovative Products*.⁴⁶ These measures provided domestic enterprises with significant advantages in relation to government procurement of high-tech products, including computers, clean power and communications.⁴⁷ While only three out of many other such indigenous innovation measures, the US China Business Council welcomed the beginning of the de-linking between government

⁴² USTR, 2011 Special 301 Report, p 23.

⁴³ USTR, 2011 Special 301 Report, p 23.

⁴⁴ USTR, 2011 Special 301 Report, p 23.

⁴⁵ USTR, 2011 Special 301 Report, p 24.

⁴⁶ US-China Business Council, ‘Statement on China’s Innovation and Procurement Regulatory Changes’, 29 June 2011, <https://www.uschina.org/public/documents/2011/06/statement-on-regulatory-changes.html> (15 August 2011).

⁴⁷ US-China Business Council, ‘Statement on China’s Innovation and Procurement Regulatory Changes’, 29 June 2011, <https://www.uschina.org/public/documents/2011/06/statement-on-regulatory-changes.html> (15 August 2011).

procurement and domestic preferential treatment.⁴⁸ This is yet another example of foreign pressure being applied to encourage compliance with WTO principles.

Other strategies introduced are ensuring well-trained and well-resourced law enforcement personnel are employed for both domestic needs and border control. An Intellectual Property Appeal Court has seen an increased volume of criminal actions, improvements in customs law enforcement (partly due to the result of the findings of the WTO Dispute Resolution Committee in January 2009) including the joint EU-China action plan to mention a few. It has introduced the new Property Law in 2007 which recognises and protects sophisticated tangible property rights therefore this notion which in the past has been alien to the Chinese is bringing about a major conceptual change in property ownership, which, one would expect, should flow onto the concept of intangible property ownership.

However, with 54 per cent of detained products at EU borders in 2008 originating from China, China remains the primary nation of concern for EU companies.⁴⁹ Even so, during the period 2004-2008, there has been a 10 per cent reduction in piracy rates for software and China is no longer in the top 20 software pirating countries.⁵⁰ The IPR Enforcement Report 2009 from the Commission of the European Communities analysed the reason for the scale of infringements in China:

...access to the Chinese judicial system is made difficult in practice because of burdensome and costly legalisation and notarisation requirements, the ineffectiveness of the preliminary injunction system and the inadequacy of the damages awarded. It is also reported that criminal sanctions are difficult to obtain. Moreover, the improving willingness of authorities is affected by a lack of effective cooperation between themselves, by insufficient training of the staff involved, and by a very low level of public awareness regarding IPR.⁵¹

⁴⁸ US-China Business Council, 'Statement on China's Innovation and Procurement Regulatory Changes', 29 June 2011, <https://www.uschina.org/public/documents/2011/06/statement-on-regulatory-changes.html> (15 August 2011).

⁴⁹ Commission of the European Communities, *IPR Enforcement Report 2009*, Brussels, p 5.

⁵⁰ Sixth Annual BSA — IDC Global Software 08 Piracy Study, In Brief, available at <http://global.bsa.org/globalpiracy2008/studies/studybrief.pdf> (12 April 2010).

⁵¹ Commission of the European Communities, *IPR Enforcement Report 2009*, Brussels, p 5.

These shortcomings, recognized in the 2008 National Intellectual Property Strategy and supported by national enforcement rates for civil judgments generally, illustrate the endemic nature of the failure to enforce judgments in China.⁵² Low rates of enforcement of judgments are a reflection of the economic development of the region in which the court is located together with the extent of corruption and protectionism at that local level, often due to the dependence of the judiciary on the local government that pays them.⁵³

However, the World Bank has found that China's corruption levels are lower compared to other developing nations with a similar per capita income.⁵⁴ Commentators attribute this to the significant efforts made by the central government to combat corruption noting that dealing with the underlying causes of corruption are necessary in order to establish a truly independent judiciary.⁵⁵ Transparency at all levels of administration and operations of the courts and their judiciary would appear to be crucial areas for reform.⁵⁶

Meanwhile, there has been an exponential increase in intellectual property infringement cases over the past few years. For instance, nationally in 2007 SIPO statistics showed that there were approximately 17,877 intellectual property rights civil cases and 2,684 criminal cases⁵⁷ with some 5 per cent having been brought by foreign companies. SIPO's 2008 report, *China's Intellectual Property Protection in 2008*,⁵⁸ illustrated significant increases in civil and criminal intellectual property cases, namely, some 24,406 first instance civil cases were

⁵² Robert Slate, 'Judicial Copyright Enforcement In China: Shaping World Opinion on TRIPS Compliance' (2006) 31 NCJ International & Com Reg 665 at 686, notes that, for the period 2003 – 2006, enforcement rates are higher in major centres compared to more remote areas.

⁵³ Robert Slate, 'Judicial Copyright Enforcement In China: Shaping World Opinion on TRIPS Compliance' (2006) 31 NCJ International & Com Reg 665 at 687.

⁵⁴ Keith Henderson, 'The Rule of Law and Judicial Corruption China: Half Way Over the Great Wall' in *Transparency International's Global Corruption Report 2007*, Corruption and Judicial Systems p 156.

⁵⁵ Keith Henderson, 'The Rule of Law and Judicial Corruption China: Half Way Over the Great Wall' in *Transparency International's Global Corruption Report 2007: Corruption and Judicial Systems*, pp, 151-152, and Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 201.

⁵⁶ Keith Henderson, 'The Rule of Law and Judicial Corruption China: Half Way Over the Great Wall' in *Transparency International's Global Corruption Report 2007: Corruption and Judicial Systems*, pp 151-152, and Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 201.

⁵⁷ SIPO, *China's Intellectual Property Protection in 2007*, http://www.sipo.gov.cn/sipo_English/laws/whitepapers/200904/t20090427_457167.html (12 April 2010).

⁵⁸ SIPO, *China's Intellectual Property Protection in 2008*, http://www.sipo.gov.cn/sipo_English/laws/whitepapers/200904/t20090427_457167.html (15 August 2011).

filed nationally with 23,518 being resolved. In the space of two years these figures have doubled. SIPO's 2010 report, *China's Intellectual Property Protection in 2010*,⁵⁹ recorded 42,931 first-instance civil cases and concluded 41,718 cases. The Special Campaign referred to above was responsible also for the instigation of significant administrative actions. In the last quarter of 2010, 44.16% of the yearly amount of patent cases were settled, the Administrations for Industry and Commerce dispatched '722,350 person times of enforcement officials', resulting in the inspection of '1,694,779 business entities as well as 108,213 wholesale and retail markets and fairs' while '1,372 businesses manufacturing or selling counterfeiting commodities were raided'.⁶⁰ In addition, the Ministry of Public Security 'uncovered 2,049 cases involving IPR infringements and counterfeits worth [2.307 billion] [Y]uan' through its Operation Strike of the Sword, part of the Special Campaign.⁶¹

It has been noted that the vast majority of civil IPR cases are between Chinese parties with only 5 per cent involving foreigners.⁶² This indicates that domestic enterprises have realised the value of intellectual property rights and have a vested interest in enforcing these rights thereby providing internal support for the central government's focus on improving intellectual property protection and enforcement.⁶³

While addressing international concerns about China's IPR enforcement capacity, the current National Intellectual Property Strategy that came into force in 2008 is recognized as domestically oriented.⁶⁴ China recognizes that progress as a nation is dependent on domestic innovation, and that technology transfer from foreign interests was and is necessary to achieve the four modernizations first espoused by Deng Xiaoping at the beginning of the Open Door Policy. Intellectual property rights are recognized as playing a significant role in the innovation process. It is no wonder that one of the latest developments in China's

⁵⁹ SIPO, *China's Intellectual Property Protection in 2010*, http://english.sipo.gov.cn/laws/whitepapers/201104/t20110429_602312.html (15 August 2011).

⁶⁰ SIPO, *China's Intellectual Property Protection in 2010*, http://english.sipo.gov.cn/laws/whitepapers/201104/t20110429_602312.html (15 August 2011).

⁶¹ SIPO, *China's Intellectual Property Protection in 2010*, http://english.sipo.gov.cn/laws/whitepapers/201104/t20110429_602312.html (15 August 2011).

⁶² SIPO, *China's Intellectual Property Protection in 2007*, http://www.sipo.gov.cn/sipo_English.laws/whitepapers/200904/t20090427_457167.html (12 April 2010); Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 202.

⁶³ Natalie Stoianoff, 'The Development of Intellectual Property Law in China' in Chan Lai-Ha, Gerald Chan, Kwan Fung (eds), *China at 60: Global-Local Interactions* (World Scientific Publishing, 2011) p 203.

⁶⁴ Commission of the European Communities, *IPR Enforcement Report 2009*, Brussels, p 5.

innovation strategy is a policy to give preference to indigenous innovation in government procurement explored above. For products to qualify, they must contain locally owned intellectual property rights. This means that products developed in China but by a foreign owned enterprise would not qualify and hence the concern expressed in two successive years of the Special 301 Reports of the USTR.⁶⁵ China has taken steps to address these concerns, at least by the symbolic revocation of three measures relating to government procurement, but given that there are many more measures and guidelines at the local and provincial levels, one wonders if the coercive nature of US-China relations is waning.

Above all it is important to remember that the previous intellectual property strategies were developed in response to foreign pressures over China's compliance with the WTO Protocol for its membership, including dealing with complaints over counterfeiting or piracy brought by the US and other intellectual property exporting nations. These foreign pressures continue and more recently the EU has been taking an active role engaging with China on IPR issues. An EU-China Intellectual Property Dialogue and an EU-China Intellectual Property Working Group have been established as part of the joint EU-China initiatives noted in the EU Report.⁶⁶ The first initiative establishes an annual event dealing with general issues of regulation and enforcement and information exchange. The second initiative is mandated to deal with specific issues or sectors. In addition, an action plan concerning EU-China customs co-operation on intellectual property rights was adopted in January 2009. Customs responsibilities in relation to counterfeit products came under scrutiny in the WTO Dispute Resolution action brought by the US in 2007 and concluded in 2009.⁶⁷ The United States border experience is worse than that of the EU with infringing 'product seizures at the United States border that were of Chinese origin accounting for 79 per cent in 2009, a small decrease from 81 per cent in 2008'.⁶⁸ While these circumstances are allowed to prevail, China will remain on the Priority Watch Lists of the Special 301 Reports provided by the USTR. The avenue for further discussion and negotiation between the United States and China remains the Joint Commission on Commerce and Trade (JCCT) and the JCCT Intellectual Property Rights Working Group.

CONCLUSION

⁶⁵ USTR, 2010 Special 301 Report, p 19; 2011 Special 301 Report, p 23.

⁶⁶ Commission of the European Communities, *IPR Enforcement Report 2009*, Brussels, p 5.

⁶⁷ WTO Dispute Resolution Action: WT/DS362.

⁶⁸ USTR, 2010 Special 301 Report, p 19.

[9.80] As China's economic development has eventuated in advance of an effective legal system, it is not surprising that the Open Door Policy saw foreign enterprises eager to establish an enterprise in China where labour was and still is cheap and plentiful. There was at the beginning of this move into China a complete absence of intangible property rights which have gradually emerged during this rapid period of economic development. As interactions with foreign interests and foreign markets increased, China's hunger for commodities and technology escalated and with it the demands by those foreign interests to have their intellectual property rights protected. It is now clear that due to foreign pressure and its rise to the second largest economy in the world, China can no longer bask in self-accomplishment as now it is a major world player and as such has to comply with international requirements in the area of intellectual property. This chapter demonstrates that China is serious about improving its intellectual property enforcement regime and it will be interesting to see at what point it will accomplish a favourable report from the Special Report Watch List of the United States.